

BEFORE LINDA MCCULLOCH, SUPERINTENDENT OF PUBLIC INSTRUCTION  
STATE OF MONTANA

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THOMAS FEENEY	)	
	)	
Appellant,	)	OSPI 288-01
	)	
	)	<b>DECISION AND ORDER</b>
	)	
vs.	)	
	)	
NORTHERN CHEYENNE	)	
TRIBAL SCHOOL,	)	
Respondent.	)	
	)	

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Having reviewed the record below and considered the parties' briefs, the Superintendent of Public Instruction issues the following Decision and Order.

**DECISION AND ORDER**

The November 29, 2001, decision by the Big Horn County Superintendent of Schools dismissing Appellant's Notice of Appeal in this matter is hereby **AFFIRMED**. Appellant's demand for costs and attorney fees is **DENIED**.

**PROCEDURAL HISTORY**

This is an appeal by Thomas Feeney ("Appellant") of a November 29, 2001, decision by the Big Horn County Superintendent of Schools ("County Superintendent"). Appellant was employed as the superintendent of the Northern Cheyenne Tribal School ("NCTS" or "Respondent"). Respondent is a federally funded school, operating with authorization from the United States Bureau of Indian Affairs and the Northern Cheyenne Tribal Council.

The governing authority of NCTS terminated Appellant's employment at NCTS effective April 30, 2001. By a Notice of Appeal dated May 22, 2001, Appellant appealed the termination to the County Superintendent. In an Order of Dismissal dated November 29, 2001, the County Superintendent concluded that the County Superintendent lacked jurisdiction to consider that appeal and dismissed the appeal.

Appellant, through his attorney, Richard Bartos, filed a Notice of Appeal with the Superintendent of Public Instruction ("State Superintendent") on December 24, 2001. Respondent entered a special appearance in this matter through its attorney, William J. Eggers III, exclusively for the purpose of submitting its opposition to this appeal and objecting to the jurisdiction of the State Superintendent in this matter.

The County Superintendent's Order of Dismissal is the subject of this appeal and the question before the State Superintendent is: Did the County Superintendent err as a matter of law in dismissing the appeal?

### **STANDARD OF REVIEW**

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in Mont. Code Ann. §2-4-704 and adopted by the State Superintendent in Admin. R. Mont. 10.6.125.

The State Superintendent may reverse or modify the County Superintendent's decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or (g) affected because findings of fact upon issues essential to the decision were not made although requested. Admin. R. Mont. 10.6.125(4).

The County Superintendent's dismissal of this appeal based on lack of jurisdiction is a conclusion of law. Conclusions of law shall be reviewed to determine if the agency's interpretation of the law is correct. Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990). The State Superintendent uses the standard that motions to dismiss are viewed with disfavor and are considered from the perspective most favorable to the opposing party. Buttrell v. McBride Land and Livestock, 170 Mont. 296, 553 P.2d 407 (1976). Bland v. Libby School District No. 4, OSPI 205-92, 12 Ed. Law 76 (June 1993).

### **MEMORANDUM OPINION**

**Issue: Did the County Superintendent err as a matter of law in dismissing the appeal?** No. The County Superintendent lacks the jurisdiction to consider appeals from decisions of the governing board of NCTS.

The County Superintendent's authority to consider matters of controversy is specifically derived from Montana statutory law. The governing statute in this matter provides: "Except for disputes arising under the terms of a collective bargaining agreement or as provided under 20-3-211 or 20-4-208, the county superintendent shall hear and decide all matters of controversy arising in the county as a result of decisions of the trustees of a district in the county." Mont. Code Ann. §20-3-210(1). A county superintendent may consider an appeal under Montana law only if each of the following elements exist: the matter is (1) a controversy (2) arising in the county (3) from a decision of a board of trustees (4) of a district in the county. In other words, "a person who has been aggrieved by a final decision of the board of trustees of a school district in a contested case is entitled to commence an appeal before the county superintendent." Admin. R. Mont. 10.6.103(1).

The decisive element in this instance is that the matter stem from "a district in the county." A district, in the context of Montana school law, is defined as follows: "As used in this title, except as defined in 20-9-402 for bonding purposes or unless the context clearly indicates otherwise, the term 'district' means the territory, regardless of county boundaries, organized under the provisions of this title to provide public educational services under the jurisdiction of the trustees prescribed by this title." Mont. Code Ann. §20-6-101(1). Montana public school districts, as contemplated in §20-6-101, are created and organized pursuant to Montana law and are governed by boards of trustees created in Montana's Constitution. Since this definition of "district" applies to §20-3-210, a county superintendent may only consider appeals of controversies resulting from decisions of the trustees of a public school district organized under the provisions of Title 20.

NCTS is not a "district" subject to the review authority of a county superintendent in this context. As plead by Appellant, NCTS is a federally funded school, existing and operating pursuant to federal law and Northern Cheyenne Tribal law. It is not a district or school organized under the provisions of Montana statutory law to provide public educational services under the jurisdiction of a board of trustees recognized in and empowered by Montana law. As such, it is not a district as contemplated in Mont. Code Ann. §20-3-210. The County Superintendent therefore properly concluded that he lacked the authority to review the decisions of NCTS's governing board.

Appellant argued that since NCTS's governing policies vested jurisdiction in this matter with the "State Court or other court of competent jurisdiction," Appellant must first exhaust the administrative appeal procedure outlined in Montana statutory and administrative law. The State Superintendent disagrees. Granted, Montana law precludes judicial review of contested cases governed by Montana's Administrative Procedure Act prior to exhaustion of all administrative remedies. However, this is not a matter that is governed by the administrative review procedure provided for in Title 20 or the Administrative Procedure Act. Indeed, the Administrative Procedure Act states that the exhaustion requirement "does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by statute." Mont. Code Ann. §2-4-703.

Finally, Appellant asserts that the County Superintendent erred in not conducting a hearing. That is not the case. At a minimum upon receiving a notice of appeal, a county superintendent must determine whether the appeal is a contested case and whether she or he has jurisdiction on the matter. Admin. R. Mont. 10.6.104(1). The Rules goes on to provide:

"(2) The county superintendent shall, at all times, have jurisdiction to determine the jurisdiction over any particular contested case. In such situations, the rules of procedure shall apply, and questions of jurisdiction may be resolved by rulings and orders *based upon the pleadings or after a hearing*, as necessary to suit the circumstances of the case."

"(3) *The county superintendent may determine that he/she does not have jurisdiction or the power to act and therefore render such determination and return such notice and order to the appealing party.* The county superintendent, upon determination of proper jurisdiction and proper contested case, shall hear the appeal and take testimony in order to determine the facts related to the contested case."

Admin. R. Mont. 10.6.104 (emphasis added). While the County Superintendent had the affirmative duty to determine jurisdiction, he was not required to hold a hearing to do so. From the record below, it is apparent that the County Superintendent had sufficient knowledge and information to make this jurisdictional determination.

## **CONCLUSION**

The County Superintendent correctly concluded that he did not have jurisdiction to review NCTS's governing board's decision in this matter and correctly dismissed Appellant's appeal. The November 29, 2001, Order to Dismiss is AFFIRMED.

Dated this 4th day of December 2002.

/s/ Linda McCulloch  
LINDA MCCULLOCH  
Superintendent of Public Instruction

## **CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on this 4th day of December 2002, I caused a true and exact copy of the foregoing "DECISION AND ORDER" to be mailed, postage prepaid, to the following:

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